92-1849

No. _____

SUPREME COURT
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

DENNIS G. LUNDER, Petitioner

vs.

CITY OF LOS ANGELES, et al., Respondents

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an officer of the Police Department of the City of Los Angeles has the First Amendment right to politically campaign, in accordance with department policies, on behalf of a city council candidate other than the one for which his Chief of Police has campaigned, without retaliation by his superior officers.

2. Whether the right of a police officer to campaign in accordance with department policies, for a city council candidate other than the one for which his Chief of Police has campaigned, is a clearly established First Amendment right, and whether the hierarchy of the police department has qualified immunity to retaliate against or to punish a

police officer for exercising said clearly established First Amendment rights.

3. Whether the grant of non-suit in favor of the City of Los Angeles was contrary to Pembaur v. Cincinnati (1986) 475 U.S. 469, and Larez v. City of Los Angeles, 946 F.2d 630 (9th Cir. 1991), in that respondent Chief of Police Gates is a governmentally authorized decision maker on policy issues creating liability against the City for his actions.

LIST OF PARTIES

The parties to the proceedings below were the petitioner Dennis G. Lunder and the respondents City of Los Angeles, Daryl F. Gates, Robert L. Vernon, Ronald Frankle, William A. Davis, Wesley A. Harvey, Peggy Stevenson, and Daniel Sullivan.

The respondents before this court include the City of Los Angeles, Daryl F. Gates, Robert L. Vernon, and Ronald Frankle.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

DENNIS G. LUNDER, Petitioner,

v.

CITY OF LOS ANGELES, DARYL F. GATES, ROBERT L. VERNON, and RONALD FRANKLE, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA.

The petitioner Dennis G. Lunder respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of California, Second Appellate District, Division Two, entered in the above entitled proceeding on November 3, 1992.

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OPINIONS BELOW

The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Two, is reprinted in the Appendix hereto, p. A1, infra.

The In Bank memorandum dated February 7, 1993 of the Supreme Court of the State of California denying petitioner's petition for review of the Opinion of the Court of Appeal is reprinted in the Appendix hereto, p. A31, infra.

JURISDICTION

Petitioner brought an action under 42 U.S.C. §1983 in the Superior Court of the State of California in and for the County of Los Angeles. Following a jury

trial in which petitioner was awarded $1,305,000.00 against respondents City of Los Angeles, Chief of Police Daryl F. Gates, Deputy Chief Robert L. Vernon and Deputy Chief Ronald Frankle, a judgment notwithstanding the verdict was entered in favor of the respondents on July 2, 1990. Petitioner appealed to the Court of Appeal of the State of California, Second Appellate District, Division Two. On November 3, 1992, the judgment was affirmed by said Court of Appeal and on February 17, 1993, the Supreme Court of the State of California, in bank, denied petitioner's Petition for Hearing.

This appeal is being docketed in this Court within 90 days from the denial of the Petition for Hearing to the Supreme Court of the State of California.

The jurisdiction of this Court is involved under 28 U.S.C. §1257.

STATUTE INVOLVED

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law... for redress."

STATEMENT OF THE CASE

Petitioner was a Los Angeles police

officer from August 1, 1966 until July 12, 1981. During that time he rose from the rank of patrol officer to captain, having attained promotion to each interim rank at the earliest possible opportunity. Petitioner was chosen as the first adjutant for respondent Daryl Gates when respondent Gates became the Chief of Police for the City of Los Angeles. In evaluating the performance of petitioner, respondent Gates, in conjunction with giving petitioner an outstanding rating, stated that:

"Lieutenant Lunder replaced a Deputy Chief, a Captain II, a Lieutenant II and two Sergeants II. The workload of this Office has increased and yet Lieutenant Lunder has maintained quality, timeliness and accuracy in spite of the above losses

in personnel because of Proposition 13 cutbacks. His ability is limitless. He is truly one of our budding stars. He is definitely ready for command responsibility. The Chief of Police has had to depend heavily on Lieutenant Lunder's ability to do an outstanding job and he has not been disappointed. The Chief of Police highly recommends Lt. Lunder to assume and perform in an outstanding fashion in any Captain assignment."

Gates and the other respondents testified that each considered Mr. Lunder a superb officer destined for higher positions in the department. Virtually every one of the petitioner's personnel evaluations reflected that he was one of the finest officers in the department.

In 1981, petitioner requested and was granted a leave of absence from the Los Angeles Police Department for reasons of family emergency. He was promised by Assistant Chief Harvey that the ninety days leave which was granted would be extended beyond its initial ending period of July 11, 1981 upon petitioner's request. During his leave of absence, petitioner, in compliance with the Los Angeles Police Department political activity guidelines, and with notice to his superiors, wrote a letter to prospective voters in support of Los Angeles City Council candidate, Michael Woo, a person that petitioner had met in a civic capacity and had come to respect. Mr. Woo was campaigning against Peggy Stevenson, the incumbent who was strongly

supported by respondent Gates and other high Los Angeles police officials. After Mr. Lunder publicly supported Mr. Woo, petitioner was informed by respondent Deputy Chief Frankle that petitioner was in "big trouble" and the he had "created problems for himself." It was agreed by respondent Frankle and Assistant Chief Harvey, with the knowledge of respondent Gates, that petitioner should be told to "knock it off."

Petitioner's later attempt to implement the promised extension of his leave of absence due to an ongoing family crisis was denied, his superior having been pre-instructed by respondent Deputy Chief Vernon to deny any request, and petitioner was forced to resign under written protest upon being threatened

with termination for being absent without leave and abandoning his position. In an admittedly unprecedented action, respondents Deputy Chiefs Frankle and Vernon recommended against the reinstatement of petitioner, proffering as a reason his "lack of understanding of the role of Captain of Police even having been in that role for 17 months," and requiring that petitioner undergo a staff officer panel inquiry upon any request for reinstatement. Testimony of other police officials at trial indicated that such language on the exit documents would signal other police agencies that the individual involved was incompetent or was under a disciplinary cloud of such nature to make the individual unemployable in law enforcement agencies

in the future.

The evidence at trial reflected that petitioner had conformed his activities to the "Political Activity Guidelines" of the Los Angeles Police Department. In addition, respondents Gates, Vernon and Frankle each testified that they were not aware of any violation by petitioner of any departmental policy respecting political activities.

The testimony of respondents Gates, Vernon and Frankle on this issue was as follows:

Respondent Gates testified:

Q. To your personal knowledge did any of Mr. Lunder's political activities with respect to his support of Mr. Woo violate any departmental policy respecting political activities by police

officers?

A. Not as far as I know.

The testimony of respondent Vernon was as follows:

Q. Do you recall at some point being made aware that Mr. Lunder was involved as a supporter of Michael Woo in the primary and general elections for the Hollywood councilmanic seat in the Spring of 1981?

A. At some point in time I became aware of that.

Q. To your knowledge, Mr. Lunder never violated any department policy with respect to his activities in that regard?

A. I never became aware of any violation of policy on his part.

Respondent Frankle testified:

Q. By Mr. Buzard: You are aware

there is certain political activity guidelines promulgated by the police department that advises its officers what they can and cannot do in terms of political activities; is that right?

A. Yes, sir.

Q. To your knowledge, none of the activities engaged in by Mr. Lunder violated the policy; is that correct?

A. I was unaware of what specific activities he was engaged in. And qualifying my answer that way I would say I had no problem with anything he was doing.

Petitioner's position at trial was that the actions of respondents constituted retaliation and punishment for his protected political activities, that he was effectively forced to resign,

and that the remarks maliciously placed on his resignation form by respondents ruined any chance he had to continue in his chosen career in law enforcement. Respondents denied the retaliation and denied that they took any punitive action against petitioner as a result of his political activities.

Petitioner's action for conspiracy to violate his civil rights under 42 U.S.C §1983 followed, and resulted in a jury award totaling $1,305,000.00, including $195,000.00 in punitive damages against respondents Gates, Vernon and Frankle.

The jury found by special verdict that the petitioner's support of Michael Woo in the political campaign was a "substantial or motivating factor" in

respondent Vernon's and Frankle's decision to deny petitioner an extension of his leave of absence and in placing "adverse information" on petitioner's resignation form. The jury further found that respondent Gates conspired with respondents Vernon and Frankle in these actions, that each respondent's conduct would not have been the same even if petitioner "had not supported Michael Woo," and that the respondents did not hold a good faith belief that their action toward petitioner "was not in violation of [petitioner's] civil rights.

Upon motion of said respondents, the trial court granted judgment notwithstanding the verdict, and in the event that the judgment notwithstanding the verdict was reversed on appeal, a new

trial.

The trial court based its ruling in large part on its belief that there was no civil right involved, specifically noting that no right or entitlement existed to a leave of absence "which rises to constitutional dimensions and [petitioner] presents no case law which would support such a right."

Appellant appealed and the California Court of Appeal affirmed the granting of the judgment notwithstanding the verdict, finding that appellant's participation in the political campaign of Mr. Woo was not a protected First Amendment activity. (A16-A17). In addition, the Court of Appeal found that respondents were entitled to qualified immunity for their retaliatory actions,

contending that the law proscribing such retaliation was not clearly established at the time the retaliation was undertaken by respondents. Petitioner also raised on appeal in state court, the granting of non-suit and a directed verdict in favor of respondent City of Los Angeles. Petitioner demonstrated at trial that respondent Chief of Police Gates had been vested by the City with broad authority to decide many policy matters, including matters relating to leaves of absence and legislative goals. The Court of Appeal did not address this issue in its decision.

Petitioner sought review of the Court of Appeal's Opinion before the Supreme Court for the State of California. Said petition was denied by

the California Supreme Court without opinion on February 17, 1993.

REASONS FOR GRANTING THE WRIT

I.

The decision of the California Court of Appeal fails to guarantee petitioner the First Amendment rights and protections to which he is entitled as a governmental employee under Mt. Healthy City Board of Education v. Doyle (1977) 429 U.S. 274 and Pickering v. Board of Education (1968) 391 U.S. 563.

The decision of the Court of Appeal determines that petitioner did not meet his burden of demonstrating that this activity was constitutionally protected, specifically finding that "the

Department's interests outweigh those of [petitioner] in this instance." (Decision A19). The California Supreme Court denied a review of the decision.

In order to reach this conclusion, the Court of Appeal engaged in a misapplication of the governing law and was forced to resort to the fiction that petitioner's political activities violated Los Angeles Police Department policy in some manner.

The reality of the matter, as shown by the testimony of respondents Gates, Vernon, and Frankle quoted in the Statement of the Case, supra, was that petitioner's actions did not violate any policy of the Department. Not only did respondents have no belief that petitioner had engaged in any conduct

violative of the Department's policies, all claimed to have taken no action at all because of his political activities.

Under such circumstances, the Decision's determination that petitioner failed to establish his activity as constitutionally protected is clearly erroneous. Petitioner well recognizes his initial burden, as set forth in Mt. Healthy City Board of Education v. Doyle (1977) 429 U.S. 274, of establishing that his conduct was constitutionally protected. He clearly met this burden. As a result, the Decision of the California Court of Appeal is in direct conflict with the large body of law guaranteeing First Amendment rights and protections to governmental employees. It is submitted that in this case the

state court has ignored the holdings in Mt. Healthy City Board of Education v. Doyle (1977) 429 U.S. 274, and Pickering v. Board of Education (1968) 391 U.S. 563, with the anomalous result that in California a governmental employee engaged in admittedly proper political campaign activity can be retaliated against in his or her employment with impunity. This writ should be granted in order to assure that this issue, arising under 42 U.S.C. §1983, is decided in conformity with applicable decisions of this Court.

II.

The finding in the decision of the State Court that respondents were entitled to qualified immunity, purport-

tedly based on Rutan v. Republican Party of Illinois (1990) 479 U.S. 62, conflicts with long standing law prohibiting interference with clearly established constitutional rights.

The decision in this case states:

"Respondents' acts violated no federal constitutional right clearly established at the time. Even assuming they acted not because [petitioner] ignored Department policy, but rather because he supported the wrong candidate, the rule subjecting such conduct to a constitutional ban against politically-motivated personnel actions by government employers, short of discharge, was not established prior to 1990. (Rutan v. Republican Party of Illinois (1990) 497

U.S. 62, politically motivated personnel actions short of discharge held to violate First Amendment; see Castro-Aponte v. Ligia-Rubero (1st Cir. 1992) 953 F.2d 1429, and see Cygnar v. City of Chicago (7th Cir. 1989) 865 F.2d 827.) Accordingly, respondents were entitled as a matter of law to the benefit of qualified immunity." (A23-A24)

Petitioner submits that the foregoing conflicts with federal case law of this Court and of the Ninth Circuit.

Purporting to rely on Rutan v. Republican Party of Illinois (1990) 479 U.S. 62, the Court of Appeal erroneously assumed that the ban on politically motivated personnel actions, short of discharge, was not clearly established until 1990.

The error in this assumption is made clear by reference to Rutan, supra, itself. As footnote number 8 in Rutan, supra, explains, the First Amendment already protected government employees from retaliation which was intended to punish the employee for exercising free speech rights:

"Moreover, the First Amendment, as the court below noted, already protects state employees not only from patronage dismissals but 'even an act of retaliation as trivial as failing to hold a birthday party for a public employee. . . when intended to punish her for exercising her free speech rights.' 110 S.Ct. 2737-2738."

In ruling on this issue, the State Court of Appeal simply ignores the entire

body of law contrary to its position. That authority includes two Ninth Circuit cases which demonstrate that retaliatory actions against government employees because of the exercise of their First Amendment rights was prohibited well before the respondents took their actions in the instant matter. Anderson v. Central Point School District No. 6, (9th Cir. 1984) 746 F.2d 505, and Bernasconi v. Tempe Elementary School District No. 3 (9th Cir. 1977) 548 F.2d 958.

In fact, Anderson, supra, explains that not only was such retaliation prohibited, but that this prohibition was "clearly established" in March 1981 (746 F.2d at 508) before the acts which are the subject of this action occurred. Petitioner submits that the Ninth Circuit

authorities cannot be ignored and that they establish the law governing this issue in 42 U.S.C. §1983 actions in this jurisdiction. The Decision of the Court of Appeal involves an unwarranted and dangerous expansion of the qualified immunity defense.

In the present case, respondents were found by the jury, by special verdict, to have taken adverse personnel actions essentially causing petitioner's termination, substantially motivated by their displeasure with his exercise of protected First Amendment rights. At the time they took such actions, and at the time of trial, they did not believe that petitioner's actions were improper or that they right to punish petitioner because of his actions. Yet, the

Decision of the Court of Appeal in this case permits such retaliation unchecked based on an obvious misreading of the applicable law. Petitioner submits that when such interference with freedom of speech occurs in the goverment of the most populous city of the most populous state, without judicial intervention, clarification is required and this petition for writ should be granted to properly limit the defense of qualified immunity.

To the extent that Castro-Aponte v. Ligia-Rubero (1st Cir 1992) 953 F.2d 1429 suggests no well established right existed at the time of the conduct in this case, petitioner suggests that the petition for writ should be granted so that the conflict with the other

authority may be resolved.

III.

The decision of the State Court of Appeal that Respondent Chief of Police Gates is not a governmentally authorized decision maker of policy issues thereby creating liability against the City of Los Angeles for his actions, is contrary to the law set forth in Pembaur v. Cincinnati (1986) 475 U.S. 469, and Larez v. City of Los Angeles (9th Cir. 1991) 946 F.2d 630.

The trial court, after examination of certain provisions of the City Charter, determined that respondent Gates was not a governmentally authorized decision maker. The court found that

this power rested with the Board of Police Commissioners and that the City of Los Angeles could therefore not be held liable for respondent Gates' actions. This issue was raised on appeal by petitioner but not addressed by the Court of Appeal in its Decision.

The state court action in this instance is directly contrary to Pembaur v. Cincinnati (1986) 475 U.S. 469, 89 L.Ed.2d 452. Pembaur holds that a municipality will be liable in a 42 U.S.C. §1983 action for action directed by those who establish government policy. 475 U.S. at 481-482. Despite the trial court's expressed belief to the contrary, respondent Chief of Police Gates is a governmentally authorized decision maker on police issues. The evidence at trial

demonstrated that a broad spectrum of policy setting powers were held by him throughout his tenure as Chief of Police. These powers included decision making discretion even in matters related to the subject matter of the instant action. In fact, respondent Chief of Police Gates has been judicially determined to be such a policymaker. Larez v. City of Los Angeles (9th Cir. 1991) 946 F.2d 630. The court pointed out that the City of Los Angeles is liable for his acts undertaken in his official capacity based on the nature of his position. 946 F.2d at 646-647.

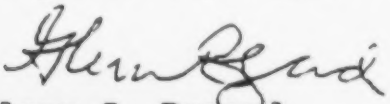
Petitioner submits that this writ should be granted in order to cause this federal question to be decided in conformity with applicable decisions of

this Court.

CONCLUSION

For these various reasons, the writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DENNIS G. LUNDER, Plaintiff and Appellant, v. CITY OF LOS ANGELES, et al., Defendants and Respondents.	No. BO51612 (Sup.Ct.No. C459673) Orig. Filed Nov. 3, 1992

Plaintiff Dennis Lunder, a former captain in the Los Angeles Police Department (the "Department"), appeals from a judgment notwithstanding the verdict entered in favor of Chief of Police Daryl Gates, Deputy Chief Ronald Frankle, and Deputy Chief Robert Vernon,

and a nonsuit in favor of the City of Los Angeles (the "City"). Appellant asserts the jury award, totaling $1,305,000, for punitive actions by the individuals which he alleged resulted in his resigning from the Department (42 U.S.C. §§ 1983, 1985) should have been allowed to stand. He contends:

"[I.] The trial court erred in granting respondents' motion for judgment notwithstanding the verdict. [II.] The order granting the conditional new trial violates Code of Civil Procedure § 657 in that it fails to set forth either any 'ground' or an adequate specification of 'reasons' for the granting of the motion. The order therefore must be reversed. [III.] The court erred in granting a nonsuit and directed verdict in favor of

respondent City of Los Angeles. [IV.] The court's exclusion of the Smith testimony and of the FBI statement was prejudicial error."

Appellant was employed for 15 years in the Department. While in its service, he completed his bachelor's and master's degrees, obtained a teaching credential, and rose through the ranks. He became adjutant to the chief and won his confidence, and, after 13 years' service, was promoted to the rank of captain. Only two years later, in 1981, he resigned. He testified at trial that while he was on leave of absence from his post in 1981 he engaged in protected political activity, participating in the Los Angeles City Council campaign of Michael Woo, and that in retaliation

certain individuals in the Department first denied him an extension of leave and then made unfavorable comments on his resignation form, precluding any further career in law enforcement.

Appellant alleged respondents conspired to and did deprive him of his civil rights in violation of federal law (42 U.S.C. §§ 1983, 1985). The case was bifurcated and tried to a jury. After presentation of evidence on liability, the trial court granted nonsuit in favor of Deputy Chief Daniel Sullivan and the City. The jury found in favor of appellant and against respondents Gates, Vernon, and Frankle on the conspiracy count, and against Vernon and Frankle only for deprivation of civil rights. Appellant put on expert evidence

regarding the value of the income and pension benefits he had lost due to his early retirement. The jury found compensatory damages of $1,110,000 against all three defendants, and $75,000 punitive damages against Gates, $55,000 against Frankle, and $65,000 against Vernon.

The standard for review of an order granting judgment notwithstanding the verdict is well settled. "If the evidence is conflicting or if several reasonable inferences may be drawn, the motion for judgment notwithstanding the verdict should be denied. [Citations]. 'A motion for judgment notwithstanding the verdict of a jury may properly be granted only if it appears from the evidence, viewed in the light

most favorable to the party securing the verdict, that there is no substantial evidence to support the verdict. If there is any substantial evidence, or reasonable inferences to be drawn therefrom, in support of the verdict, the motion should be denied.' [Citation]" (Hauter v. Zogarts (1975) 14 Cal.3d 104, 110.)

The evidence, viewed according to the standard for review of a judgment notwithstanding the verdict, shows the following. In late December 1980, appellant requested an educational leave of absence for a year, from February 8, 1981, to February 7, 1982, to enable him to obtain a Ph.D. He was on vacation from December 29, 1980, through February 7, 1981. On February 8, 1981, he

commenced a three-month conditional leave, pending approval of the one-year educational leave request. On March 12, 1981, he was informed that his leave would be cancelled unless he provided the Department with additional information, including proof of enrollment.

Appellant did not comply, but rather sent a series of correspondences to the Department. The first was a letter dated March 30, 1981, in which he requested that his educational leave be changed to personal leave. He indicated he would not be undertaking the doctoral program because he feared the fact the college was unaccredited could cause him to be accused of misconduct. He also stated he believed personal leave would comport with Department policy because he had

heard that another officer had been given one year's personal leave for vacation purposes.

He sent a second letter on April 2, noting that he had been informed there would be no problem regarding accreditation, but he had nevertheless decided not to seek a doctorate, and was "heavily involved in a political campaign, and . . . attending to some very pressing family matters." The family matter referred to financial difficulties facing his in-laws' business.

On April 16, 1981, after speaking to Chief Harvey, appellant submitted a new request for personal leave, reducing the term to end July 11, 1981. There was conflicting evidence regarding the

substance of the conversation between Harvey and appellant. Appellant testified that Harvey assured him that if an extension was necessary he would receive it. Harvey vigorously denied that additional leave time had been discussed. The only documentation of the conversation is silent on the point. It is not our function to reweigh the evidence. Though appellant's only evidence is his self-serving testimony, we are compelled to regard it as established, for purposes of judgment notwithstanding the verdict, that Harvey assured appellant he would receive more time if necessary.

While on leave, appellant supported the Woo campaign, writing two letters on his behalf which were sent to the voters

of the 13th Council District, which included Hollywood. They are attached as exhibits to this opinion. In the first letter, appellant was identified as "Former Captain, L.A. Police Department." and criticized the incumbent, Peggy Stevenson, for her handling of police-related matters. In the second, he was identified as "Former Captain, Hollywood Division, L.A.P.D." He stated, "Individual police officers rarely speak out during a political campaign. However, a majority of the officers serving the 13th District, whom I know personally, are supporting Mike Woo in his campaign for election to the city council."

The Department's political activity guidelines allowed employees to "on their

own time, take part in any campaign or political activity related to an election of a candidate for political office or ballot measure. Employees may also be identified as police personnel, but they may not participate in a manner so as to represent that the City or any of its departments, offices, agencies, or officials have endorsed a candidate for political office . . . unless the City has taken a public position on the matter."

Participation in a City Council campaign, however, was not regarded as an appropriate ground for personal leave of absence. In addition, officers who had reached the rank of captain were counseled to insulate themselves from local candidates who would find it

convenient to have the support of law enforcement officers "because of the big emphasis on law and justice." The policy was based upon the captain's role in representing the Department before a variety of community organizations. They were expected to remain neutral with respect to local politics except in support of legislation already supported by the city council and in voicing their opinion only on legislation in which they had expertise, i.e., criminal justice affairs.

Despite this Department policy, Gates supported Stevenson for City Council in the 1981 race because of her endorsement of a plan to increase the number of officers in the Department. She won the election.

On May 12, 1981, appellant was sent written confirmation of approval of his leave, scheduled to end July 11, 1981. Gates confirmed the dates in his official notice to the Board of Police Commissioners, dated May 13, 1981.

In the meantime, appellant assisted his in-laws' recreational vehicle parts business, which was facing financial difficulties. He oversaw an auction of its assets prior to May 12, 1981, and purchased molds which the top bidder did not want for $140,000. In June, he set up a new company to manufacture plastic parts using those molds. He testified he had intended to establish the business and then return to his career with the Department.

Prior to appellant's request, a

year-long personal leave of absence for an officer at the rank of captain or above had never been granted by the Department. The policy against extensive personal leave for captains was based upon the need for consistency and direction for those over whom the officer had command responsibilities. In addition, a captain's absence was felt to be a greater professional loss than the loss of an employee of lower rank.

Frankle informed appellant that he had made a mistake in writing the letters supporting Woo. Captain Jack Smith warned him to be careful when he came back from leave, because the Department would "do" him. Unhappiness about appellant's involving himself in a City Council campaign was expressed at

Department staff meetings.

In the latter part of June, appellant was informed that any request for extension of his leave would be denied. On June 24, 1981, appellant was advised of the impending end of his leave, and that he should contact the Department to receive an assignment at least one week prior to his anticipated return. Although he had intended to ask for a three-month extension because he needed additional time to establish the parts business and protect his investment, appellant did not do so. He testified he believed it would have been futile. He instead resigned, submitting a written form on July 11, 1981, detailing his need for additional time to resolve a family business problem and

that he had been told there was no chance for an extension.

Frankle and Vernon both wrote on appellant's resignation form that he lacked understanding of the responsibilities of a captain of police. Vernon also recommended against reinstatement.

Appellant did not request reinstatement or use administrative remedies to challenge his departure from the department. He did not seek further employment in law enforcement.

Respondents' combined motions for judgment notwithstanding the verdict and for new trial were granted, and this appeal followed.

Appellant's first contention lacks merit. Appellant had the burden initially of proving that (1) his

activity was constitutionally protected, and (2) that the activity was a "substantial" factor in the employment decision of his employer. (Mt. Healthy City Board of Ed. v. Doyle (1977) 429 U.S. 274, 287).

The first issue is one of law. "[T]he court must balance the employee's interest in making the statement [pertaining to matters of public concern] against the public employer's interest in promoting efficiency." (Chico Police Officers' Assn. v. City of Chico (1991) 232 Cal.App.3d 635, 648.) "[I]t cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the

citizenry in general. . . ." (Pickering v. Board of Education (1968) 391 U.S. 563, 568.) Although partison political activity is protected by the First Amendment in the general sense, that right gives way to public employer's legitimate interest in efficient operations. (Broadrick v. Oklahoma (1973) 413 U.S. 601.)

"[I]n police officer cases, it is imperative that special emphasis be placed upon the paramilitary nature of police operations; the necessity of developing and maintaining discipline, morale, loyalty, confidentiality and efficiency of the force with [a] view toward the proper protection of the public safety . . . " (Unruh v. City Council (1978) 78 Cal.App.3d 18, 24-25;

and see Joyner v. Lancaster (4th Cir. 1987) 815 F.2d 20). The Department's interests outweigh those of appellant in this instance. The Department, a City agency, relies upon good relations with City Council members, with whom it works closely, to ensure its effectiveness. Captains, who represent the Department before local organizations, lose their effectiveness to the extent they appear to be partisans in local campaigns. In addition, there are strong public policy reasons for keeping law enforcement out of the political arena.

As the court below properly noted, both the Hatch Act (5 U.S.C. § 7324) and the California Code of Judicial Conduct (Canon 7) demonstrate that an employee's rights with regard to elections and

campaigning are not absolute. The Department policy against captains publicly endorsing a candidate for the City Council is sufficiently tailored to activity which could interfere with its efficiency. In addition, to the extent appellant's second letter purported to speak on behalf of other officers, it would appear to violate the Department's written policy statement.

The Chief of Police was not a captain, and arguably not subject to the Department's policy regarding political endorsements. Gates's acts would not in any event excuse appellant's actions. Nor was the Department precluded from setting a higher standard for captains then that contained in its general political activity guidelines. Command

officers, who are more closely identified with Department leadership, may be asked to bear an extra burden of impartiality.

Even assuming appellant's First Amendment interests outweighed those of the Department, however, respondents were entitled to a qualified immunity from liability. "Availability of a qualified immunity defense is a question of law to be reviewed de novo. [Citation.]" (Tomer v. Gates (9th Cir. 1987) 811 F.2d 1240, 1241.) "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. [Citations.]" (Harlow v.

Fitzgerald (1982) 457 U.S. 800, 818.) The decisions to extend a leave of absence and to place remarks on an employee's resignation form are both matters of managerial discretion.

"Whether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly established law.' [Citation.] No other 'circumstances' are relevant to the issue of qualified immunity." (Davis v. Scherer (1984) 468 U.S. 183, 191.) "Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision. [Fn. omitted.]" (Id., at p. 194.)

Respondents' acts violated no federal constitutional right clearly established at the time. Even assuming they acted not because appellant ignored Department policy, but rather because he supported the wrong candidate, the rule subjecting such conduct to a constitutional ban against politically-motivated personnel actions by government employers, short of discharge, was not established prior to 1990. (Rutan v. Republican Party of Illinois (1990) 497 U.S. 62, politically motivated personnel actions short of discharge held to violate First Amendment; see Castro-Aponte v. Ligia-Rubero (1st Cir. 1992) 953 F.2d 1429, and see Cygnar v. City of Chicago (7th Cir. 1989) 865 F.2d 827.) Accordingly, respondents were entitled as

a matter of law to the benefit of qualified immunity.

Moreover, there was insufficient proof that the personnel actions were motivated by his political activities. "A rule of causation which focuses solely on whether protected conduct played a part, 'substantial' or otherwise, in a decision not to rehire, could place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing. The difficulty with [that] rule . . . is that it would require reinstatement in cases where a dramatic and perhaps abrasive incident is inevitably on the minds of those responsible for the decision to rehire, and does indeed play a part in

that decision--even if the same decision would have been reached had the incident not occurred . . . ." (Mt. Healthy City Board of Ed. v. Doyle, supra, 429 U.S. at p. 285.)

Appellant met his initial burden to show that his political activity was a substantial factor in respondents' personnel decisions by producing evidence tending to show the Department was unhappy with his political activities and told him no additional leave would be granted. Respondents, however, countered with unrebutted evidence that no other employee of appellant's rank had ever received personal leave of one year and that there was a policy against their receiving extended personal leave. Appellant's reason for wanting more

leave, to establish a business venture, was of no benefit to the Department and did not present the sort of "dire emergency" which might justify an unprecedented leave extension. Appellant's deliberate refusal to return to his post was unbecoming to one who had reached the inner circle of leadership in the Department. We do not believe a police officer should be allowed to further his own interests by interjecting politics into the decision to grant or deny an unsupportable leave request.

In addition, there was no substantial showing of a causal relationship between the conduct of the police officials and the damages sought. After appellant had supported Woo, respondents approved his leave through July 11, 1981.

Although appellant asserts the Department reneged on Harvey's promise to give him additional leave, appellant neither asserted the agreement nor submitted a request for an extension. Instead, he simply elected to voluntarily resign, and only thereafter to raise the issue of a promised extension. That is, appellant decided to leave the Department rather than face what he asserts would have been discrimination based upon his political activities. He did so voluntarily and may not complaint that respondents would have treated him unfairly had he returned to his post.

Upon appeal, appellant has abandoned his position that he is entitled to relief based upon conspiracy to deprive him of equal protection of the laws (42

U.S.C. § 1985, subd, (3)). He asserts instead that he proved a conspiracy to interfere with First Amendment rights, protected under section 1983, citing Mansell v. Saunders (5th Cir. 1967) 372 F.2d 573. Since we conclude there was no violation of that section, we need not address the issue whether the trial court erred in finding no substantial evidence of conspiracy.

Having concluded appellant's first contention is without merit, we need not reach his second and third contentions.

Appellant's fourth contention also lacks merit. He asserts the trial court erred in excluding certain evidence at trial pursuant to section 352 of the Evidence Code. The first ruling involved evidence of interviews conducted by the

Federal Bureau of Investigation in 1985, in which unfavorable comments regarding appellant's character were attributed to Deputy Chiefs Glenn Levant and Dan Sullivan. The second involved a prior inconsistent statement by Levant. He testified he had known nothing involving appellant at the time in issue beyond his requesting leave and subsequently resigning. Appellant offered evidence that Levant had told Smith in 1981 that appellant was in trouble with the Department because of supporting Woo.

The trial court did not exceed its discretion. In both cases the probative value of the evidence was slight compared to the risk of prejudice. Moreover, appellant has not indicated in what respect he was prejudiced by the rulings.

As noted, for purposes of judgment notwithstanding the verdict, we have accepted as true that appellant's superiors were unhappy with his public support for Woo. The rulings, or course, obviously had no adverse effect on the jury verdict.

The judgment is affirmed.

NOT FOR PUBLICATION

Filed Feb. 17, 1993

Second Appellate District,
Division Two, No. B051612
S030221

IN THE SUPREME COURT OF THE STATE
CALIFORNIA

IN BANK

DENNIS G. LUNDER, Appellant

v.

CITY OF LOS ANGELES Et Al., Respondents

Appellant's petition for review DENIED.

LUCAS
Chief Justice

Supreme Court, U.S.
FILED
JUN 16 1993
OFFICE OF THE CLERK

No. 92-1849

In The

Supreme Court of the United States

October Term, 1992

DENNIS G. LUNDER,

Petitioner,

vs.

CITY OF LOS ANGELES, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeal Of The State Of California
Second Appellate District Division Two

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1.) Whether respondents, officers of a municipal police department, enjoy the protection of qualified immunity from liability for discretionary actions, not violative of any "clearly established" federal statutory or constitutional rights of the petitioner, which were taken in the good faith performance of their duties as employers and administrators.

2.) Whether petitioner established the existence of a legally cognizable and unbroken chain of causation between the alleged unlawful actions of respondents and the injuries he allegedly suffered.

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BRIEF IN OPPOSITION

STATUTE INVOLVED

42 United States Code, Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . for redress."

STATEMENT OF THE CASE

This action was originally filed by appellant, on July 8, 1983, seeking damages against numerous defendants for alleged civil rights violations. Following a series of successful demurrers by defendants, a fourth amended complaint was filed and, on that basis, the case proceeded to trial on two causes of action (i.e. 42 U.S.C. § 1983 and 42 U.S.C. § 1985(3)) before Los Angeles Superior Court Judge Richard A. Lavine on April 16, 1990.

After some 14 days of trial both sides rested whereupon defendants moved the court for nonsuit and directed verdicts, pursuant to California Code of Civil Procedure Section 581(c), on the ground, among others, that individually-named defendants were entitled to qualified immunity as a matter of law. Said motions were granted as to defendant City of Los Angeles and denied as to all other defendants. Thereafter, the jury was instructed and the case submitted for its consideration.

Following deliberations, the jury returned verdicts in favor of plaintiff and against defendants assistant Chief of Police Robert Vernon and Deputy Chief of Police Ronald Frankle on the first cause of action, violation of civil rights (i.e. § 1983).[1] On the second cause of action (i.e. § 1985(3)), the verdict was against Chief of Police Daryl F. Gates, Assistant Chief Robert Vernon and Deputy Chief Ronald Frankle. All remaining defendants were found to be not liable under either cause of action.

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[1] The jury did *not* find against Chief Gates on the § 1983 cause of action.

Thereafter the jury assessed compensatory damages against all defendants in the amount of $1,110,000.00 and punitive damages of $75,000.00, $65,000.00 and $55,000.00 against defendants Gates, Vernon and Frankle, respectively.

Defendants filed motions for judgment notwithstanding the verdict and for a new trial on May 24, 1990. On June 28, 1990 the motions were orally argued by the parties and the court rendered its written order granting the judgment notwithstanding the verdict and, alternatively, a new trial. Said order was entered on July 2, 1990. The judgment in favor of defendants was upheld by the California Court of Appeal on November 13, 1992 and review was denied by the California Supreme Court on February 7, 1993. Thereafter, the instant petition was filed in this court.

SUMMARY OF ARGUMENT

This case involves an appeal brought by a former command officer of the Los Angeles Police Department (hereinafter, "LAPD") based upon allegations that his civil rights were violated upon the denial of his request for an extension of a personal leave of absence in 1981. Essentially, appellant contended at trial that the denial of a requested extension to his leave of absence was in retaliation for his involvement in the political campaign of a candidate for the Los Angeles City Council. According to his theory, the mere denial of the requested extension *"forced"* him to resign his position as Captain of Police and brought his entire career in law enforcement,

both with LAPD and elsewhere, to an abrupt and irretrievable end.

Simply stated, the overriding issue presented in this case can be summarized as being whether the law contemplates the awarding of over $1,000,000.00 in taxpayers' money to a former civil servant who made the personal decision to voluntarily resign his position as a Captain of Police because of his dissatisfaction with the decision to not extend his leave of absence for a length of time unprecedented in the history of LAPD. Such a windfall verdict was initially rendered by the jury and subsequently overturned, on respondents' motion, by the trial judge. Petitioner now seeks to have the windfall reinstated through a variety of legal arguments. However, as found by the state courts, neither the facts nor the law entitle him to a windfall of such astronomical proportions at taxpayer expense.

At the outset the Court is urged to keep its focus fixed firmly upon the issue of causation. For, regardless of the Court's view regarding any other issues raised in the petition, the single most important deficiency in proof occurred in appellants's failure to establish anything even closely resembling an unbroken chain of causation between the unlawful conduct alleged and the damages sustained.

The decision below was in accordance with the body of law that pertains to the granting of qualified immunity to government employees acting in the good faith performance of the discretionary functions associated with their positions in government. There is no question of law at issue that justifies the grant of a writ of certiorari here.

ARGUMENT

I.

THE TRIAL COURT PROPERLY GRANTED RESPONDENTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND, ALTERNATIVELY, FOR A NEW TRIAL

A. Respondents Enjoyed Qualified Immunity As A Matter of Law[2]

As properly determined in the state courts, the individual respondents in this action are entitled to the benefit of qualified immunity from liability under 42 U.S.C. § 1983 in the exercise of their discretionary functions insofar as their conduct did not violate clearly established constitutional rights of which a reasonable person should have known. *Harlow v. Fitzgerald, supra,* 457 U.S. 800, 818; *Anderson v. Creighton* (1987) 483 U.S. 635, 97 L.Ed.2d 523, 107 S.Ct. 3034. Because of the balancing requirement in cases involving First Amendment activities by public employees, at least one federal appellate court has astutely observed:

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[2] In reviewing respondents' argument the court is reminded that the reason for the doctrine of "qualified immunity" is that the actions of government officials should not be unreasonably constrained by the threat of legal challenge. The underlying rationale being, as recognized by this very court, "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority" in the legitimate performance of the duties affixed to their positions in government. *Harlow v. Fitzgerald,* 457 U.S. 800, 807, 73 L.Ed.2d 396 (1982) This case presents a classic example of the continuing need for courts to diligently uphold the assertion of such protection for our public servants.

> "One consequence of case-by-case balancing is its implication for the qualified immunity of public officials whose actions are alleged to have violated an employee's First Amendment rights. *There will rarely be a case for a priori judgment that the termination or discipline of a public employee violated 'clearly established' constitutional rights." Noyola v. Texas Dept. of Human Services,* 846 F.2d 1021, 1025 (5th Cir. 1988). (Emphasis added).

The same court also stated, in another similar case:

> " . . . [R]easonable government officials knowing only that they must not infringe on [employee First Amendment rights], would not necessarily know just what conduct was prohibited." *Hodorowski v. Ray,* 844 F.2d 1210, 1217 (5th Cir. 1988).

In its efforts to define the elements of the qualified immunity defense, this court originally recognized two distinct aspects of the defense, "objective" and "subjective." "The objective element attempted to focus on the extent to which a reasonable person in the position of the defendant should have known of basic, unquestioned constitutional rights" of the plaintiff. *Wood v. Strickland,* 420 U.S. 308, 322, 43 L.Ed.2d 214, 225 (1975). The "subjective" component inquired into the state of mind, specifically the "good faith," of the defendant and attempted to delineate what specific forms of intent were permissible and impermissible. *Id.*

Because of the difficulties of applying the "subjective" or "good faith" portion of the qualified immunity defense, the Court abandoned it in 1982 in favor of a

completely objective analysis. Superseding all prior decisional law on the subject, the Court established in *Harlow v. Fitzgerald,* supra, the current test for qualified immunity in damages actions under 42 U.S.C. § 1983:

> "We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818, 73 L.Ed.2d at 410.

Under *Harlow* no inquiry into the official's actual state of mind is relevant; "whether an official may prevail in his qualified immunity defense depends upon the 'objective reasonableness of [his] conduct as measured by reference to clearly established law' [citation omitted]. No other 'circumstances' are relevant to the issue of qualified immunity." *Davis v. Scherer,* 468 U.S. 183, 82 L.Ed.2d 139, 147 (1984).

The ultimate legal question is whether each defendant acted in an objectively reasonable manner:

> "At common law, in cases where probable cause to arrest was lacking, a complaining witness's immunity turned on the issue of malice, which was a jury question. Under the *Harlow* standard, on the other hand, an allegation of malice is not sufficient to defeat immunity if the defendant acted in an objectively reasonable manner . . . Respondents will not be immune if, on an objective basis, it is obvious that no reasonable competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue,

> the immunity should be recognized." *Malley v. Briggs*, 475 U.S. 335, 89 L.Ed.2d 271, 278 (1986) (footnote omitted)

Malley v. Briggs addressed the question of the availability of qualified immunity in a false arrest context, where the arrest allegedly flowed from a police officer seeking and eventually obtaining the issuance of a warrant on the basis of what the officer should have known was not probable cause. As this court pointed out, the alleged malice of the defendant officer, crucial at common law, was irrelevant to the question of § 1983 immunity. The sole question for § 1983 immunity purposes was whether no reasonably competent officer would have concluded that the warrant should be sought, with the understanding that immunity should be granted if officers of reasonable competence and experience could disagree on the issue.

As *Malley v. Briggs* makes clear, the question of whether the individual officers' conduct was objectively reasonable is one of law, not fact, and is properly addressed by the court, not the jury. *Id.; Stein v. Board of City of New York*, 792 F.2d 13, 17-18 (2d Cir. 1986).

While appellant certainly disputes the appropriateness of the actions taken by respondents and can offer his view as to how their exercise of discretion should have been different, the legal question remains whether similarly situated police department managers of reasonable competence could disagree about the appropriate actions to take regarding appellant under the circumstances presented. If reasonable minds could differ, one must infer that respondents acted reasonably within the bounds of

the discretion accorded them as high level managers in LAPD.

Again, specifically, the relevant inquiry here is whether respondents could have reasonably believed that their challenged conduct to be lawful in light of the information that they possessed at the time of their actions. *Anderson, supra.* The answer as to each respondent is clearly yes. Accordingly, under *Anderson,* they are each entitled to qualified immunity for their actions.

At trial appellant had the burden of showing that respondents' conduct violated his "clearly established" federal constitutional or statutory rights. *Tomer v. Gates,* 811 F.2d 1240, 1241 (9th Cir. 1987). See also *Lutz v. Weld County School Dist.,* 784 F.2d 340, 342-343 (10th Cir. 1986); *Abel v. Miller,* 824 F.2d 1522 (7th Cir. 1987). Moreover, the cases hold that to find a "clearly established" right authority must be presented, *by plaintiff,* showing that the right in question was "clearly established" by the United States Supreme Court, the appropriate Court of Appeals or by the reviewing court itself:

> "[I]n the ordinary instance, to find a clearly established constitutional right, a district court must find binding precedent by the Supreme Court, its court of appeals or itself. In an extraordinary case, it may be possible for decisions of other courts to clearly establish a principle of law. For the decisions of other courts to provide such 'clearly established law,' these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind

> of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting." *Ohio Civil Service Employees Ass'n v. Seiter*, 858 F.2d 1171 (6th Cir. 1988).

The trial court was correct in ruling that appellant did not make the requisite showing of "clearly established" law on the issues presented in this case.

CONCLUSION

The state court decision did not involve an important question of federal law which has not been, but should be, settled by this court; nor is there a conflict among federal courts on the issues before the court. The opinion of the California Court of Appeal was just, proper and in accord with federal law as previously decided by this court. For the foregoing reasons, the petition for certiorari must be denied.

DATED: June 16, 1992

Respectfully submitted,

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